GRAND CARE SDN. BHD.

v.

KFC HOLDINGS (MALAYSIA) BHD.

HIGH COURT MALAYA KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J
[PETITION NO. D5-26-5-95]
17 FEBRUARY 1995

COMPANY LAW: *Injunction - Injunction restraining shareholders from casting their vote - Whether unfairly prejudicial.*

An extraordinary general meeting was scheduled on 18 February 1995 by notice to consider and pass as ordinary resolutions the resolutions for the removal of three of the respondent's directors (the Laus) with immediate effect and for the appointment of one Timothy M. Lane as director. The notice by the requisitionists, Kenanga Nominees (Tempatan) Sdn. Bhd. was given to all shareholders of the respondent.

The requisition letter was strongly opposed by Lau Eng Guang (LEG), who spoke on behalf of the Laus and Leong Hup Holdings Berhad (Leong Hup), at a board of directors' meeting held on 27 January 1995. The Laus were the directors and principal shareholders of Leong Hup, a substantial shareholder of the respondent company. He alleged that the convening of the EGM would be an act in bad faith, and tried to elicit an undertaking from the directors representing substantial shareholders of the company to vote against the resolutions should the EGM be convened by the requisitionists, holding that recourse may be had to legal proceedings if no undertaking was forthcoming. The boards of directors did not convene the EGM, hence the convening of the EGM by the requisitionists.

The petitioner, who owned five hundred shares of the respondent company, applied to the Court for an order that, in the event an injunction or order was obtained from the Court preventing the chairman from accepting any votes cast by any shareholder at the EGM, the chairman be empowered to adjourn the EGM notwithstanding the adjournment was not consented to by the meeting, to a date after the injunction order is discharged or determined by the Court. The basis was that the resolutions would be prematurely frustrated by reason of any order of the Court against like-minded members of the company prior to any full ventilation and final determination by the Court of the merits or otherwise of any such order obtained *ex parte* and this amounted to an unfair and artificial restraint on the collective will of the members of the company. The petitioner was of the view that it was unfairly prejudicial to the petitioner to have the expression of its will in respect of the resolutions prematurely defeated.

Leong Hup thereafter obtained, *inter alia,* an injunction restraining substantial shareholders from voting.

Held:

It would be prejudicial to those in favour of the resolution, if the resolution of the requisitionists had to be put to the EGM when substantial shareholders are disabled by an injunction from supporting them, as it would also be prejudicial to those who were deprived of their vote. Thus, the removal by one set of shareholders of a substantial body of the opposition may plainly be prejudicial to the opposition, and the allies of that opposition.

[Order in terms granted].

Case referred to:
Global Natural Resources Plc. (unreported) High Court of Justice, Chancery Division, 10 September 1982) ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 144(3), 153

For the petitioner - Loh Siew Cheang (Ooi Huey Ling with him); M/s. Cheang & Ariff
For the respondent - C. K. Yeoh; M/s. Kam Woon Wah & Co.

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:

The Extraordinary General Meeting (hereinafter "the EGM") of the respondent had been scheduled at 10 a.m. on 18 February 1995, the result of a notice dated 3 February 1995, by Kenanga Nominees (Tempatan) Sdn. Bhd. and TA Nominees Sdn. Bhd. pursuant to s. 144(3) of the Companies Act 1965 (hereinafter "the Act"). The petitioner here owns five hundred shares of the respondent and had filed this summons in chambers upon a certificate of urgency on 14 February 1995 asking for:

(1) Upon the undertaking by the petitioner to abide by any order of this Court or a Judge may make as to damages in the case the Court or the Judge should thereafter be of the opinion that the respondent shall have sustained, if any, by reason of this order which the petitioner ought to pay, for an order that where

(i) any injunction injuncting any one or more of the members of the company from exercising their voting rights at the EGM or any order of like effect; and/or

(ii) any order of the Court the effect of which shall be to prevent the chairman from accepting any votes cast by any shareholder at the EGM,

shall have been obtained and shall not have been wholly discharged prior to the commencement of the EGM at 10.00 a.m. on 18 February 1995, then the chairman of the EGM (whosoever he shall be) be empowered to and shall, notwithstanding anything contained in Article 66 or any other provision of the Company's Articles of Association, and notwithstanding that the meeting shall not have consented to or directed such adjournment, as soon as is reasonably practicable after such commencement and in any event before any of the resolutions shall be put to the EGM, declare the EGM to be adjourned with immediate effect to such time and place and such date as shall be specified in such declaration, such date in any event to be after the orders in paragraph (i) and (ii) have been discharged or otherwise determined by the Court;

(2) In the event that the adjourned EGM shall be held at a date after a period of greater than 30 days from the date of the EGM, an order that notice of the adjourned EGM shall be deemed to have been duly given if advertised once in the Malay, English and Chinese newspapers not less than fourteen (14) days before the adjourned EGM and that other than notice in the manner aforesaid, no other notice need be given;

(3) Such further or other relief as this Honourable Court deems fit and proper to grant;

(4) That costs of this application be costs in the cause.

The matter was fixed on 16 February 1995 and after learned Counsel for the petitioner and for the respondent had made their submissions, I had adjourned the matter to the following day when I had decided to grant the order in terms of the petitioner's application with the usual undertaking for damages.

As stated by learned Counsel for the petitioner, the issues raised here raise a number of legal principles of public interest and he had relied heavily on *Global Natural Resources Plc.* (unreported - per Sir Robert Megarry, High Court of Justice, Chancery Division - 10 September 1982). Learned Counsel for the respondent had admitted that at first he was going to object to the application but after reading the said authority, he was now neither objecting nor consenting to the application and had left the matter to the Court.

It is pertinent to refer to the petition itself. The respondent had been incorporated on 22 December 1980 as a private limited company and was originally known as Poon Guan Holdings Sdn. Bhd. until it was changed to its present name on 11 July 1986, it was subsequently converted to a public company on 13 March 1987.

The authorised share capital as at 31 October 1994 was RM150 million comprising a hundred and fifty million ordinary shares of RM1 each with 100,858,100 issued and credited as fully paid up and the remaining 49,141,900 still unissued.

The Board of Directors comprised the following:

(a) YB Dato Hj. Mohd. Sarit bin Hj. Yusoh

(b) Lau Chong Wang

(c) George Ting Yew Tong

(d) Lau Eng Guang

(e) Datuk Lau Tuang Nguang

(f) Tuan Haji Ishak bin Ismail

(g) YBhg. Datuk Abang Hj. Zainie bin Abang Suhai

(h) Pierre Jean-Claude Moccand

(i) Peter Kratz (Alternate to Pierre Jean-Claude Moccand)

(j) Tan Sri Dato' Dr. Ahmad Mustaffa Bin Haji Babjee

The notice by the requisitionists had stated that the purpose for holding the EGM was to consider and if thought fit to pass as ordinary resolutions the resolutions for the removal of three of the directors namely Lau Chong Wang, Lau Eng Guang and Datuk Lau Tuang Nguang (hereinafter "the Laus") with immediate effect and for the appointment of one Timothy M. Lane as director. The requisitionists had also given notice on the same date to all the shareholders of the respondent pursuant to s. 153 of the Act.

The requisition letter had met with strong opposition from Lau Eng Guang (hereinafter "LEG"), one of the directors sought to be removed under the resolutions, speaking on behalf of the Laus and Leong Hup Holdings Berhad (hereinafter "Leong Hup") when it came up for consideration by the board of directors of the company at its fortyfirst board of directors' meeting (hereinafter "the board meeting") on 27 January 1995. At the board meeting, LEG, reading from a prepared text, alleged that there was an underlying agreement that all substantial shareholders of the company shall jointly participate in the management of the company without the exclusion of any one of them and that as such, the convening of the EGM would be an act in bad faith contrary to this agreement. It was further alleged that the resolutions were part of a scheme to dilute the shareholdings of certain substantial shareholders in the company. LEG went on to elicit an undertaking from the directors representing substantial shareholders of the company to vote against

the resolutions should the EGM be convened by the requisitionists. He further stated that if no such undertaking was forthcoming, recourse may be had to legal proceedings to protect against the interests of the Laus and Leong Hup. The board of directors of the company did not convene the EGM hence the convening of the EGM by the requisitionists.

In the week prior and subsequent to the board meeting, LEG had on several occasions threatened Tuan Haji Ishak bin Ismail (hereinafter "Ishak") that he would take steps to injunct certain shareholders from voting at the EGM, in particular Golden Plus Holdings Berhad and the requisitionists and would also file a petition to wind-up the company. The most recent of these series of threats was during and immediately after a meeting at Bank Negara attended by, *inter alia*, LEG and Ishak on or about 28 January 1995. The shareholders aforementioned collectively represent approximately 48.75 per cent of the total shares of the company and are in favour of the resolutions. The Laus are directors and the principal shareholders of Leong Hup, a substantial shareholder of the company holding, directly or indirectly, in total 30,030,000 shares in the company amounting to 29.7 per cent of the shares in the company, 8,000,000 shares of which were acquired on 13 October 1994.

In the light of the matters and events described earlier, the petitioner was under the apprehension that there was a very real risk that at any time prior to the EGM, the Laus, their servants, agents, or parties aligned to them may seek to obtain, *ex-parte*, injunctions to restrain, or any other order of the Court that shall have the effect of restraining or impeding, the exercise at the EGM of voting rights by members of the company who, like the petitioner, intend to vote in favour of the resolutions or which otherwise prevents cognisance or acceptance of such votes by the chairman of the EGM. The petitioner contends that an injunction or any other order of the Court of the nature stated if granted will unfairly discriminate against or will otherwise unfairly prejudice the petitioner and those members who, like the petitioner, intend to vote in favour of the resolutions should the resolutions be put to a vote whilst one or more of the members of the company inclined to vote for the resolutions is or are disabled from so voting or at all.

Viewed in conjunction with the events and matters stated earlier, the unfair discrimination or unfair prejudice manifests itself in the real and net effect of such an order on the resolutions, The Laus are opposed to the resolutions. They hold, as stated earlier, 29.7 percent of the shares in the company. Should the members aforementioned be enjoined from effectively exercising their voting rights at the EGM, it is almost certain that the resolutions will be defeated, a substantial block of the opposition having been eliminated. The petitioner is of the view that it is unfairly prejudicial to the petitioner to have the expression of its will in respect of the resolutions prematurely frustrated by reason of any order of the Court against like-minded members of the company prior to any full ventilation and final determination by the Court of the merits or otherwise of any such order obtained *ex parte* and this amounts to an unfair and artificial restraint on the collective will of the members of the company. The removal by one set of shareholders of a substantial body or any part thereof of the opposition is plainly unfairly prejudicial to that opposition, and allies of that opposition.

The Rt. Hon. the Vice Chancellor Sir Robert Megarry in the *Global Natural Resources Plc.* case (*supra*) had stated:

Those proceedings consisted of an attempt by a plaintiff, acting on behalf of himself and all other shareholders who had served written requisitions on the company pursuant to s. 140 of the Companies Act 1948, and another plaintiff, to enjoin the completion of a certain transaction. By this transaction, Global (as I shall call the company) was to take over an American company called McFarlane Oil Co. Inc. in return (*inter alia*) for the issue of some 3.25 million unissued bearer shares in Global, The requisitionists (as I shall call them) have required resolutions for the removal and replacement of all the existing directors of Global to be voted on at the annual general meeting of Global called for Monday next, 13 September. Although over 21 million of the 25 million authorised shares in Global had been issued, the voting power of 3.25 million shares would be very considerable, especially as the shares are bearer shares, and attendances at Annual General Meetings have been relatively small. After a hearing of 6 days I held that no injunction should be issued; and the Court of Appeal affirmed this decision. The basis of the requisitionists' contentions was that the dominant motive of the directors of Global in entering into the McFarlane transaction was to benefit not Global, but themselves, by providing a large number of votes likely to be cast in their favour ...

On behalf of the requisitionists, Mr. Hoffmann contended that the application was not within s. 75. In substance, the relief sought is that the chairman at the annual general meeting should be at liberty to adjourn any vote on the requisitionists' 14 resolutions for the removal and replacement of the existing directors of Global if, when the resolutions are put to the meeting, any of the former McFarlane shareholders are restrained from voting by any order in legal proceedings, or the company is similarly restrained from accepting such votes, or by any such means any of the 3.1 million shares are shorn of their votes. This order is to continue until the determination of all legal proceedings (I put it shortly), or further order. An amendment to the notice of motion extends the chairman's powers to cover the case of an order made after the votes have been cast but before the result of the poll has been ascertained ...

Mr. Hoffmann also contended that all the other shareholders in Global had a right to have the resolutions put to the meeting and voted on, and that it would be grossly unfair to them to prevent this being done. He also said that the shareholders had no right to have a meeting at which all the shareholders could vote. Further, he contended that any arguments on unfairness ought to be addressed to the Courts of the United States or other country in which any injunction is sought, rather than to this Court, which ought not to make any order which would frustrate the decision of the foreign Court. This Court ought not to say that an injunction granted by a Court in the United States would produce an unfair result ...

It seems to me that it would be prejudicial to the petitioners, who wish to retain the existing board of directors, if the resolutions of the requisitionists had to be put to the annual general meeting at a time when the holders of some 3.1 million shares are disabled by some interlocutory order from supporting them. The danger to them is that without these votes the existing directors may be ousted and new directors appointed whose view is that the assets of the company should be disposed of. It must also be prejudicial to the former McFarlane shareholders to have matters decided against their views at a meeting at which they had, by action of the requisitionists, been deprived of their vote. If a further order were to be obtained by the requisitionists (and the Texas order seems to be such an order) I think the act of putting the removal and replacement of the directors to the meeting while the former McFarlane shareholders were restrained by order from voting would be "unfairly" prejudicial because such an order would be yet a further litigious step, taken at the last minute without a full hearing in an attempt to escape the effects of previous litigious defeats both here (after substantial hearings) and in the United States, Last minute injunctions or orders are always suspect, unless (as is often the case) there is a satisfactory explanation of the tardiness; and here I have heard none.

I do not think I need embark on questions whether the shareholders in Global have any "right" to have the disputed resolutions put to the meeting, or whether shareholders have any "right" to have a meeting at which all shareholders can vote. The question before me is not one of "rights" of this kind, but of what is "unfairly prejudicial", whatever "rights" there may or may not be, the removal by one set of shareholders of a substantial body of opposition may plainly be "prejudicial" to that opposition, and the allies of that opposition. The fact that the means of removal is not some illegal activity but an interlocutory order of a foreign Court does not, per se, prevent that removal from being "unfairly prejudicial" to those removed and their allies. It may, of course, be established here that such a removal is, under English law, entirely proper; but unless and until that is done, it seems to me that an interlocutory order of a foreign Court, obtained at the last minute under foreign law, should not be held to be incapable of being "unfairly prejudicial" here, just because it is an order of a Court ...

I also hesitated at one stage on the relief being framed so as to give the chairman of the annual general meeting a discretion to adjourn the voting on the disputed resolutions, instead of requiring him to adjourn that voting; for the basis for seeking the order was that to put these resolutions to the vote would be unfairly prejudicial, and so it could be said that the adjournment ought to be made mandatory. However, it seems that, at least in theory, some other Court might make an order in respect of only a small number of the 3.1 million shares in question, and it might well be oppressive to make an adjournment mandatory in respect of too small a number of shares to matter. Accordingly, I think that it is right to put the order sought in terms of a discretion in the chairman at the annual general meeting. I should add that Mr. Hoffmann objected that the petitioners were receiving financial backing out of Global's funds, and that this was a misuse of the directors' powers. That indeed may be the subject of complaint in proper proceedings for the purpose; but I do not think that it affects what I have to decide.

True to expectations, Leong Hup had in fact filed another petition in another Court against the following:

1. Tuan Haji Ishak bin Ismail
2. George Ting Yew Tong
3. Dato' Haji Mohd. Sarit bin Hj. Yusoh
4. Golden Plus Holdings Bhd.
5. Pangkal Bahagia Sdn. Bhd.
6. Kenanga Nominees (Tempatan) Sdn. Bhd.
7. TA Nominees Sdn. Bhd.
8. Kentucky Fried Chicken International Inc.
9. Timothy M. Lane
10. KFC Holdings (Malaysia) Bhd.

On 15 February 1995, the following order was obtained *ex parte* in that other petition:

(a) (1) that the first, second, third, fourth, fifth, sixth and seventh respondents whether by themselves, their servants or agents or otherwise howsoever be restrained and an injunction be issued to restrain them, whether by themselves, their servants or agents or otherwise howsoever from exercising the voting rights in respect of the 33,075,000 ordinary shares in the tenth respondent held by them or any of them in respect of any other shares of the tenth respondent which are held by them or any of them either directly or indirectly in support of all the resolutions proposed to be moved at the EGM of the tenth respondent to be held on 18 February 1995;

(2) that the eighth and ninth respondents, whether by themselves, their servants or agents or otherwise howsoever be restrained and an injunction be issued to restrain them, whether by themselves, their servants or agents or otherwise howsoever from interfering with or meddling in the management of the tenth respondent;

(3) that the eighth and ninth respondents, whether by themselves, their servants or agents or otherwise howsoever be restrained and an injunction be issued to restrain them, whether by themselves, their servants or agents or otherwise howsoever from terminating the Franchise Agreement dated 1 September 1993 between the tenth respondent and the eighth respondent;

(b) that in the event and arising from this *ex parte* order, the chairman of the EGM of the tenth respondent company fixed on 18 February 1995 requires to adjourn the said meeting at its inception and prior to the passing of any resolution, the petitioner herein as a shareholder of the tenth respondent shall not object to such adjournment, by reference to Article 66 of the Articles of Association of the tenth respondent;

(c) that the petition with supporting affidavits, the summons-in-chambers and its amendment together with this order be served on the respondents forthwith;

(d) that the amended summons-in-chambers be heard *inter partes* on 27 February 1995 at 9.00 a.m.;

(e) that the costs of this application be in the cause.

I was of the view, having considered the submissions of learned Counsel for the petitioner here, the stand taken by learned Counsel for the respondent here, and the principles set forth in the *Global Natural Resources P1c*. by learned Counsel, that it would be wholly prejudicial to all the other shareholders if the Laus and Leong Hup manage to get the EGM vote in their favour in these circumstances. I had, therefore, accordingly granted the order in terms of the petitioner's application.